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ARIZONA CORPORATION COMMISSION

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December 1, 2009

VIA REGULAR MAIL AND E-MAIL

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Mesa, AZ 85201-6654

Arizona Corporation Commission  
**DOCKETED**

DEC - 1 2009

DOCKETED BY	<i>MS</i>
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RE: *In the Matter of Jolleen K. Hansen, et al.*, Docket No. S-20693A-09-0378

Dear Mr. Smith:

In response to your letter of November 24, 2009, this letter provides the legal authority justifying the pursuit of the above-referenced matter ("the Administrative Action") despite the bankruptcy filing by the Hansens.

Jurisdiction and Authority of the Arizona Corporation Commission

The Arizona Corporation Commission ("Commission") has jurisdiction over the Administrative Action pursuant to Article XV of the Arizona Constitution and the Securities Act of Arizona, A.R.S. §44-1801 et seq. ("Securities Act"). The intent and purpose of the Securities Act is to protect the public; to preserve fair and equitable business practices; to suppress fraudulent or deceptive practices in the sale or purchase of securities; and, to prosecute persons engaged in fraudulent or deceptive practices in the sale or purchase of securities. *See* Laws 1951, Ch. 18, §20.

The Administrative Action is Exempt from the Automatic Stay

The filing of a bankruptcy petition operates as a stay of "the commencement or continuation...of a judicial, administrative, or other action or proceeding against a debtor..." 11 U.S.C. §362(a)(1). The general policy behind the automatic stay is to grant complete and immediate, albeit temporary relief to the debtor from creditors, and to prevent dissipation of the debtor's assets before orderly distribution to all creditors can be effected. *S.E.C. v. Brennan*, 230 F.3d 65, 70 (C.A.2 (N.Y.) 2000)(quoting *Penn Terra Ltd. v. Department of Env'tl. Resources*, 733 F.2d 267, 271 (3d Cir.1984)). A main purpose of the stay is to protect the priority of payment to creditors. 3 Collier on Bankruptcy §362.05[5][b] at 362-61 (15<sup>th</sup> Ed. 2000).

Section 362(b) establishes several exceptions to the automatic stay. Section 362(b)(4) provides that the automatic stay does not apply to:

...the commencement or continuation of an action or proceeding by a governmental unit...to enforce such governmental unit's...police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's...police or regulatory power.

Section 362(b)(4) permits the government to initiate or continue an action under its police or regulatory powers without the restrictions of the automatic stay. In Re Universal Life Church, Inc., 128 F.3d 1294, 1297 (C.A.9 (Cal.) 1997); 3 Collier on Bankruptcy §362.05[5][b], at 362-58 (15th ed. 1996). The purpose of this exception is to prevent a debtor from "frustrating necessary governmental functions by seeking refuge in bankruptcy court." S.E.C. v. Brennan, 230 F.2d at 71 quoting City of New York v. Exxon Corp., 932 F.2d 1020, 1024 (2d Cir. 1991). To prevent bankruptcy from becoming "a haven for wrongdoers," the automatic stay should not prevent governmental regulatory, police, and criminal actions from proceeding. In Re Universal Life Church, Inc., 128 F.3d at 1297; 3 Collier on Bankruptcy §362.05[5][a], at 362-54 (15th ed. 1996).

The legislative history of §362(b)(4) indicates that when a governmental unit brings a legal action against a debtor in order "to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay." S.Rep. No. 95-989 at 52 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 5838; H.R.Rep. No. 95-595 at 343 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6299; In Re Universal Life Church, Inc., 128 F.3d at 1298.

The United States District Court for the District of Arizona has specifically held that the automatic stay does not preclude an investigation by the Arizona Corporation Commission ("Commission") regarding possible violations of the Securities Act of Arizona because actions of the Commission are pursuant to the Commission's police and regulatory power. In re Knoell, 160 Bankr. Rep. 825, 826 (D. Ariz. 1993). The exception in §362(b)(4) applies whenever a governmental unit is exercising a valid and traditional police or regulatory power. In re PMI-DVM Real Estate Holdings, L.L.P., 240 B.R. 24, 30 (Bkrtcy.D.Ariz. 1999).

Here, the Commission exercised valid and traditional police and regulatory powers in the Administrative Action that is therefore exempt from the automatic stay.

#### The Relief Sought and Obtained by the Commission Against the Hansens was Legally Appropriate

In the bankruptcy case of In re Charter First Mortgage, Inc., the Washington State Attorney General sought injunctive relief against the debtor, civil penalties and restitution of money on behalf of the victims for alleged violations of the Washington Consumer Act. In re Charter First

Mortgage, Inc., 42 B.R. 380 (Bankr.D.Or. 1984). The bankruptcy court concluded that it was appropriate for Washington to attempt to obtain an injunction and civil penalties for alleged violations of the Washington Consumer Act.

In the case of In re Poule, a registered contractor argued that revocation of his license and the civil fines imposed on him by the Registrar of Contractors of the State California violated the automatic stay in §362(a)(1). In re Poule, 91 B.R. 83, 85 (9th Cir. BAP 1988). The court held that when a state agency imposes civil penalties on a debtor for fraudulent conduct or when the state agency is attempting to prevent future fraudulent conduct through injunctive relief, the action comes within the scope of §362(b)(4). In re Poule, 91 B.R. at 87 (emphasis added).

Once a court determines that a proceeding is excepted from the automatic stay by §362(b)(4), the court can allow the governmental unit to fix the amount of penalties, up to and including entry of a money judgment. S.E.C. v. Brennan, 230 F.3d 65, 71-2 (C.A.2 (N.Y.) 2000). These cases and others hold that "anything beyond the mere entry of a money judgment against a debtor is prohibited by the automatic stay." Brennan, 230 F.3d at 71. This is consistent with language in §362(b)(4), "...including the enforcement of a judgment other than a money judgment..." Of course, the proceeding in which the money judgment is entered must be one to enforce the governmental unit's police or regulatory power. Brennan, 230 F.3d at 71.

Here, the Commission sought and obtained the Order to Cease and Desist, for Restitution, and for Administrative Penalties ("the Order") that permanently enjoins the Hansens from future violations of the Securities Act and it fixes the amount of restitution and penalties that the Hansens must pay. In the context of the above-referenced cases, it could be said that the Order is the mere entry of a money judgment against the Hansens, especially in light of the fact that the Commission acknowledges that it cannot attempt to collect on the Order unless it submits a claim to the bankruptcy court like any creditor of the Hansens must do.

The Commission Did Not Need to File a Motion for Relief From the Automatic Stay with the Bankruptcy Court to Proceed with the Administrative Action

The Bankruptcy Court does not need to grant relief from the automatic stay before the Commission may proceed with an action that is exempt from the automatic stay pursuant to 11 U.S.C. §362(b)(4). The court in which litigation is pending has jurisdiction to determine whether the proceeding before it is subject to the automatic stay. S.E.C. v. Bilzerian, 131 F.Supp.2d 10, 14 (D.D.C. 2001); NLRB v. Sawulski, 158 B.R. 971, 975 (E.D.Mich.1993). The court in Bilzerian, as many other courts must do, had to first address whether the proceeding before it was affected by the automatic stay provision found in §362(a). Bankruptcy courts do not have exclusive jurisdiction in determining the applicability of the automatic stay. S.E.C. v. Bilzerian, 131 F.Supp.2d at 14; In re Montana, 185 B.R. 650, 652 (Bankr. S.D.Fla. 1995); NLRB v. Sawulski, 158 B.R. at 975. As such, the Commission had jurisdiction to determine whether the automatic stay applied to the Administrative Action.

As articulated above, the automatic stay does not apply to an administrative case when the governmental unit is exercising its police and regulatory powers. The Bankruptcy Court of

Arizona has confirmed this position on multiple occasions. For example, the Commission brought an administrative action against Arthur B. and Linda A. Cooper in Docket No. S-03550A-04 alleging violations of the Securities Act. The Coopers filed a bankruptcy petition in Case No. 2-05-26746 RJH. By request of the Commission's Administrative Law Judge and pursuant to a procedural order issued thereby, the Commission filed with the Bankruptcy Court a motion for relief from the automatic stay. Bankruptcy Judge Randolph J. Haines granted the motion and found as follows:

The Arizona Corporation Commission is a governmental agency enforcing its police and regulatory power;

Pursuant to 11 U.S.C. §362(b)(4), police and regulatory actions commenced by the Arizona Corporation Commission are not stayed by these bankruptcy proceedings; and,

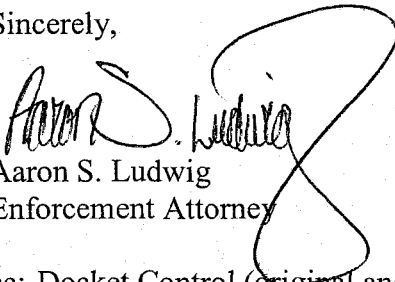
The Arizona Corporation Commission may proceed with their investigation, and also proceed to exercise their regulatory powers as provided by law.

Specifically, the [Bankruptcy] Court recognizes the authority of the Arizona Corporation Commission to enter Orders in administrative and civil proceedings, including but not limited to, those that provide for injunctive relief, for penalties, for restitution and for the revocation of licenses as provided by law; however, the Arizona Corporation Commission may not attempt to execute upon the monetary judgment so long as the Bankruptcy Court has jurisdiction over the debtor. (See EXHIBIT A, enclosed herewith)

As the Cooper matter demonstrates, the Bankruptcy Court has acknowledged that the Commission's actions and proceedings to enforce the Securities Act fit squarely within 11 U.S.C. §362(b)(4). Thus, the Commission did not need to file a motion for relief from the automatic stay with the Bankruptcy Court to proceed with the Administrative Action.

In conclusion, the Commission's pursuit of the Administrative Action, including the legally appropriate relief sought and obtained against the Hansens, was justified despite their bankruptcy filing. If you have any questions, please do not hesitate to contact me.

Sincerely,



Aaron S. Ludwig  
Enforcement Attorney

cc: Docket Control (original and 13 copies)  
The Honorable Marc E. Stern  
Ernest G. Johnson

# **EXHIBIT A**

IT IS HEREBY ADJUDGED  
and DECREED this is SO  
ORDERED.

The party obtaining this order is responsible for  
noticing it pursuant to Local Rule 9022-1.

Dated: January 26, 2006

1 ARIZONA CORPORATION COMMISSION

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9 Attorney for Movant

  
RANDOLPH J. HAINES  
U.S. Bankruptcy Judge

10 UNITED STATES BANKRUPTCY COURT

11 DISTRICT OF ARIZONA

12 In re:

13 ARTHUR BRYAN COOPER and LINDA A.  
14 COOPER,

15 Debtor.

In Proceedings Under  
Chapter 13

Case No: 2-05-26746 RJH

16 ARIZONA CORPORATION COMMISSION,

17 Movant,

ORDER APPROVING MOTION FOR  
RELIEF FROM THE AUTOMATIC STAY

18 vs.

19 ARTHUR BRYAN COOPER and LINDA A.  
20 COOPER,

21 Respondents.

22 This matter having come on to be heard upon the Arizona Corporation  
23 Commission's Motion for Relief from the Automatic Stay filed on November 4, 2005, the  
24 Respondents having submitted their response and a reply having been filed as well, and the  
25 Court having heard the Oral Arguments of the parties, the Court hereby finds as follows:  
26

